

APR 6 1977

APPENDIX

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-5344

JAMES RAYMOND MOORE,

Petitioner,

—v.—

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1976
CERTIORARI GRANTED JANUARY 17, 1977

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I N D E X

	Page
Chronological List of Relevant Docket Entries	1
Opinion of the Illinois Supreme Court, <i>People v. Moore</i> , 51 Ill. 2d 79 (1972)	3
Petition for a Writ of Habeas Corpus	10
Memorandum of Decision and Order Dismissing the Peti- tion for Failure to Exhaust State Remedies	18
Unpublished Order of Court of Appeals, Vacating Order of Dismissal and Remanding for Further Proceedings	20
Appendix A to Petitioner's Reply Memorandum (Affidavit of Frederick F. Cohn)	24

	Page
Memorandum of Decision and Order Granting Respondent's Motion for Summary Judgment	27
Order Granting Certificate of Probable Cause and Leave to Appeal in Forma Pauperis	37
Unpublished Order of Court of Appeals, Affirming the Dismissal of the Petition for a Writ of Habeas Corpus	38
Order of Court of Appeals Denying the Petition for Rehearing En Banc	47
Transcript of Proceedings held in Cook County Municipal Court, December 21, 1967	48
Excerpts from Transcript of Proceedings held in Cook County Municipal Court, February 5, 1968	50
Excerpts from Transcript of Proceedings held in Cook County Circuit Court, April 5, 1968	53
Excerpts from Transcript of Proceedings held in Cook County Circuit Court, June 24, 1968	56
Excerpts from Transcript of Proceedings held in Cook County Circuit Court, June 26, 1968	70
Excerpts from Transcript of Proceedings held in Cook County Circuit Court, June 27, 1968	86
Instructions Submitted by the State and the Defense re: Identification	89
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari	90

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

- August 29, 1973 Leave Granted to Petitioner James R. Moore, *pro se*, to File Petition for writ of Habeas Corpus *In Forma-Pauperis*
- October 19, 1973 Petitioner's *pro se* Motion for Search Warrant docketed
- March 20, 1974 Order Dismissing Petitioner's *pro se* Petition for Writ of Habeas Corpus for Failure to Exhaust State Remedies, with Memorandum of Decision Attached
- April 10, 1974 Petitioner James R. Moore's *pro se* Application for Certificate of Probable Cause, Notice of Appeal *in Forma Pauperis*
- May 6, 1974 Denial of Petitioner's *pro se* Application for Certificate of Probable Cause
- May 10, 1974 Certification and Transmittal of Record to United States Court of Appeals, Seventh Circuit
- August 7, 1974 Order Granting the Petitioner's Certificate of Probable Cause and Leave to Appeal *In Forma Pauperis*; Vacating the District Court's Decision; and Remanding for All Necessary Proceedings Consistent with the Court of Appeals' Opinion
- November 1, 1974 Petitioner's Memorandum of Law
- November 8, 1974 Order Entered for State to Show Cause Why Relief Should Not be Granted
- November 18, 1974 Petitioner's Motion for Appointment of Counsel and for Extension of Time
- November 20, 1974 Petitioner's *pro se* Motion for Leave to Amend the "Memorandum of Law"
- December 24, 1974 Order Granting Petitioner's Motion for Ten Days in which to Amend Memorandum of Law and for Thirty Days for the State to Reply

January 8, 1975 Petitioner's Amended Memorandum of Law in Support of Constitutional Issues Raised in Petitioner's Habeas Corpus Petition

February 3, 1974 Respondent's Motion to Dismiss or for Summary Judgment

May 8, 1975 Order Entered, Finding that the State Appellate Defender's Assumption of the Responsibility of Representing Petitioner Moore Removed the Necessity of the Motion for Appointment of Counsel and that the Amended Memorandum of Law Satisfied the Need for any further Amendments

June 5, 1975 Order Granting Respondent's Motion for Summary Judgment, with Memorandum of Decision Attached

July 7, 1975 Order Granting Petitioner's Motions for Certificate of Probable Cause, and for Leave to Appeal *in Forma Pauperis*

August 4, 1975 Appeal Docketed in the United States Court of Appeals for the Seventh Circuit

September 9, 1975 Petitioner-Appellant's Brief Filed

October 16, 1975 Respondent-Appellee's Brief Filed

October 30, 1975 Petitioner-Appellant's Reply Brief Filed

January 20, 1976 Oral Argument Held Before Seventh Circuit Judges Hastings, Cummings and Bauer

April 27, 1976 "Unpublished Order" Entered, Affirming the Judgment of the District Court

May 11, 1976 Petition for Rehearing En Banc Filed in the Seventh Circuit

June 10, 1976 Order Denying the Petition for Rehearing En Banc

September 8, 1976 Petition for a Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis* Docketed in the United States Supreme Court

January 17, 1977 Order Granting Motion for Leave to Proceed *In Forma Pauperis* and Petition for a Writ of Certiorari in the United States Supreme Court

IN THE
SUPREME COURT OF ILLINOIS

No. 42484

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

v.

JAMES R. MOORE, DEFENDANT-APPELLANT

January 28, 1972

GOLDENHERSH, Justice.

Defendant, James R. Moore, was found guilty by a jury in the circuit court of Cook County of the offenses of rape, deviate sexual assault, burglary and robbery, and sentenced to concurrent sentences of not less than 30 nor more than 50 years on each of the rape, burglary and robbery convictions, and not less than 5 nor more than 10 years on the conviction for deviate sexual assault.

The complaining witness testified that on December 14, 1967, at approximately noon, she was awakened from a nap by noise in her apartment. As she opened her eyes, she saw a man standing in her room. She screamed, and the man leaped upon her and began choking her. He turned her over on her stomach, removed part of her clothing and covered his face with a bandanna. He forced her to perform an act of oral copulation, and then raped her. He left the apartment taking with him several items of personal property including two musical instruments.

[1, 2] As ground for reversal defendant contends first that he was denied equal protection of the law when the trial court denied his request for a transcript of the preliminary hearing at which the complainant testified. The record shows that at a motion hearing approximately two months prior to trial defense counsel requested a copy of the transcript of the preliminary hearing. The trial court stated that he was not entitled to the transcript but that the "preliminary hearing statements" would be preserved and would be available "for you and

for your use at the time of trial." At the trial, following the testimony of the complaining witness, defense counsel again requested the transcript. It was determined that the testimony had not been transcribed and the court ordered counsel to proceed without it.

Citing *Roberts v. LaValle*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41, defendant argues that the refusal of the transcript violated his constitutional rights for the reason that if he were not indigent he could have ordered the testimony transcribed. The people contend that *Roberts* is not applicable for the reason that the New York statute involved in *Roberts* specifically provides for furnishing the transcript upon payment of the statutory fee and there is no comparable statute in Illinois. Defendant argues, and we agree, that the distinction for which the People contend is not valid for the reason that under the provisions of section 5 of the Court Reporters Act (Ill.Rev.Stat.1969, ch. 37, par. 655) a defendant able to pay the fee would have been able to obtain the transcript. We hold that under the authority of *Roberts* the cases therein cited, and *Mayer v. City of Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), the denial of the transcript deprived defendant of equal protection of the laws.

When the testimony adduced at the preliminary hearing was transcribed is not shown, but the transcript is included in the record on appeal. Citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, defendant argues, correctly, that for error of constitutional dimensions to be deemed harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. We have examined the testimony at the trial, the testimony at the hearing on defendant's motion to suppress the identification of the defendant by the complaining witness, and the transcript of the preliminary hearing, and fail to find any testimony for which the transcript could have been used for purposes of impeachment. Defendant argues that in the hearing to suppress, and at trial, the complaining witness testified the assault occurred shortly after noon and that at the preliminary hearing she testified "it was

night." Taken out of context that statement might appear to support defendant's contention that there is a discrepancy in her testimony, but read with her other testimony at the preliminary hearing it is obvious she meant her room was darkened because the windows were covered. We conclude that the denial of the transcript was harmless beyond a reasonable doubt.

[3] Defendant contends next that the trial court committed reversible error in refusing to call the complainant as the court's witness in the hearing on the motion to suppress the identification. He argues, without pointing out any specific instance, that the ruling deprived him of the opportunity to impeach her with her prior statements. The one specific reference in the argument is to a police report which obviously could not be used to impeach the complainant. Under the circumstances shown in the record we cannot say that in denying the request the court abused its discretion.

[4] Defendant contends next that the trial court erred in unduly limiting his cross-examination of a police officer witness at the hearing to suppress. The record shows that although the court sustained the People's objection to a question, the information was elicited in response to another question propounded very shortly thereafter. Defendant has not demonstrated, nor do we perceive, in what manner the ruling complained of was prejudicial.

[5-7] The defendant complains of the trial court's refusal to order the court reporter, during cross-examination of the complainant at the trial, to read back parts of her testimony on direct examination. He argues that the prior answers were proper impeachment, and the court's ruling was error. Defendant has confused allegedly contradictory testimony at the trial with inconsistent prior statements, which, not having been heard by the trier of fact, may be shown for purposes of impeachment. We find no authority to support defendant's contention, and the trial court did not err in its ruling. The record also shows that although he did not consider it necessary to do so, the trial court, at the close of the People's case, recalled the complainant and permitted

defendant to interrogate her and show that there was a discrepancy in her testimony regarding the selection of the photographs from which the identification was made. Assuming, *arguendo*, that the ruling of which defendant complains was error (and we hold it was not), under the circumstances shown it was rendered harmless.

[8] Defendant contends that he was deprived of his sixth amendment right to confront the witness. This argument is based on the alleged refusal of the People to furnish defendant with the complainant's correct address. He argues that failure to furnish him with her address in California where she testified she was living at the time of trial deprived him of his right "to investigate her very transient existence during this time in order to investigate her reputation and any other strange activities which might be admissible for the purpose of affecting her credibility." The record shows that defendant was given the only two addresses at which she lived in Chicago and that the court took great pains to assure her availability for interview by defense counsel. She testified she had lived in California for only six days and except for the speculative suggestion that such information might have led to the discovery of information not elicited in the course of her lengthy and repetitive cross-examination, defendant has failed to show how he was in any manner prejudiced by the failure to know her California address. The contention is wholly without merit.

[9] Defendant contends next that the identification of defendant is the product of a "suggestive photographic identification procedure and a suggestive corporeal identification procedure." In support of this contention defendant argues that the identification of the defendant by the complainant is based upon an improperly suggestive procedure employed in the course of the complainant's examination of photographs furnished by the police and in the manner of her viewing the defendant at the preliminary hearing.

The complainant testified that when she was awakened she had been sleeping for approximately 45 minutes, that the only light in her room came through a window which was covered by a quilt, that the only time she saw de-

fendant's face was for a period of 10 or 15 seconds before he covered it with a bandanna. At no subsequent time while he was in her apartment could she see his face. Upon his departure she called the police and when they arrived at her apartment she told them she had been raped. She described her assailant as a negro male, 20 to 25 years old, 185 lbs., six feet tall, dark complected and wearing a yellow sweater. She was taken to the emergency room at Billings Hospital and examined by a physician. After having been examined at the hospital, complainant described her assailant to other police officers as weighing over 200 lbs. with facial hair around his mouth and chin. At the time of the occurrence defendant was 6 ft. 2 inches tall, weighed 240 lbs, and had a beard.

Two days later, from over 200 photographs, complainant elected several that resembled her assailant. A few days later she tentatively identified the photograph of defendant from a group of about 10 photographs, but stated she could not be certain unless she saw him again. She was then requested by a police officer to sign a criminal complaint naming defendant. When defendant was brought into court for a preliminary hearing, complainant was also in the courtroom. After defendant's name had been called and he stepped forward before the bench, complainant identified him as her assailant.

The complainant also testified that on the evening preceding the day of the occurrence she saw defendant in Smedley's Restaurant, located near her apartment and that defendant had engaged her in conversation. Defendant argues correctly that none of the police reports contain any indication that complainant had told them she had seen defendant on the preceding evening but the complainant and one officer testified that she had given the police this information after she returned from her examination at the hospital.

The record does not support defendant's contention that the examination of the photographs was conducted in a manner to suggest the selection of any of the 200 individuals as her assailant and the fact that she was permitted to see the defendant at the preliminary hear-

ing does not, under the circumstances shown, taint her identification. The record shows a sufficient basis for an identification wholly independent of the viewing of the photographs and her seeing the defendant in person at the preliminary hearing is shown to have merely confirmed her identification from the photograph.

[10] Defendant contends next that the evidence is not sufficient to prove him guilty beyond a reasonable doubt. In addition to the testimony heretofore reviewed the record shows that after her assailant left the apartment complainant found on the floor of her bedroom a checkbook which was the property of a friend of defendant. Inside the checkbook was a letter which the owner testified she had written on December 12, 1967, but had not mailed. She testified further that on December 13, 1967, she had given the defendant the keys to her apartment and asked him to remove some personal property which he had left there. Defendant stipulated that he had removed the letter from the friend's apartment.

At the time of defendant's arrest the police searched his apartment. One of the officers testified that he had recovered the items stolen from complainant. On cross-examination, however, he testified he had no knowledge that complainant had ever identified them as hers, nor did complainant testify that she was ever asked to identify them.

Two witnesses called on behalf of defendant testified that they were students with defendant at Roosevelt University and were with defendant in the university cafeteria at noon on December 14, 1967, discussing a program planned for the school on the next day, which was the day class let out for the Christmas vacation.

A friend of defendant and a waitress employed at Smedley's Restaurant both testified that on the night defendant spoke with complainant at Smedley's they remembered defendant's searching on the floor of the restaurant for an object he had lost and which he described as a "kind of a book."

Defendant argues that the alibi testimony was unimpeached and the loss of the checkbook at Smedley's satisfactorily explains its presence in complainant's apart-

ment. He argues further that the complainant did not have the opportunity to see her assailant in sufficient light or for a sufficient time to make a reliable identification and cites alleged discrepancies in her description and the failure of the police report to show any reference to her having seen him on the preceding evening. Upon review of the entire record we do not find the evidence so unsatisfactory as to raise a reasonable doubt of defendant's guilt, and absent such finding we will not disturb the verdict and judgment.

[11] Defendant contends next that he was denied equal protection of law when he was denied the use of the police department's arrest records of prospective jurors. The record does not satisfactorily show that the State's Attorney was in possession of the information sought in defendant's motion but assuming, *arguendo*, that he was, it would have been no more available to an affluent defendant than to an indigent, and there is here no denial of equal protection.

Defendant contends next that improper argument and prejudicial conduct on the part of the State's Attorney denied him a fair trial. A detailed review of the contentions will be of no precedential value and it suffices to say that our examination of the record fails to persuade us that any of the conduct of which defendant now complains was so prejudicial as to require reversal.

[12] Finally defendant contends that because all of the charges arose out of one transaction, involving one victim, it was improper to impose more than one sentence. Each of the offenses of rape, robbery and burglary, although committed in the course of the same transaction, involves conduct clearly divisible from the conduct which constitutes the other offenses. With respect to the offenses of rape and deviate sexual assault, there is precedent for the imposition of separate sentences. (*People v. Scott*, 43 Ill.2d 135, 251 N.E.2d 190; *People v. DeFrates*, 395 Ill. 439, 70 N.E.2d 591.)

We find no reversible error and the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case No. 73C 2222

August 29, 1973

PERSONS IN STATE CUSTODY

UNITED STATES OF AMERICA EX REL
JAMES RAYMOND MOORE 64142

—vs—

STATE OF ILLINOIS

1. Place of detention Statesville (ISP) Box 112 Joliet, Illinois 60434
2. Name and location of court which imposed sentence
Circuit Court of Cook County—Chicago, Illinois
3. The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed:
 - (a) Indictment Number 68-549; Offense: Robbery, Burglary, Rape and Sexually
 - (b) Deviate Assault
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Date August 23, 1968 30-50, 30-50, 30-50, and
 - (b) 5-10 respectively.
 - (c) _____
5. Check whether a finding of guilty was made
 - (a) after a plea of guilty _____

- (b) after a plea of not guilty X-After a Plea of Not Guilty
- (c) after a plea of *nolo contendere* _____
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
 - (a) a jury Jury
 - (b) a judge without a jury _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list
 - (a) the name of each court to which you appealed:
 - i. Illinois Supreme Court
 - ii. United States Supreme Court
 - iii. _____
 - (b) the result in each such court to which you appealed:
 - i. Judgment Affirmed
 - ii. Petition for Certiorari Denied
 - iii. _____
 - (c) the date of each such result:
 - i. January 28, 1972 Affirming Opinion filed, April 6, 1972 Judgment entered
 - ii. November 6, 1972
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. — Ill. 2d —, 281 N.E. 2d 294
 - ii. Unknown
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a)
- (b)
- (c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) THAT DENIAL OF PRELIMINARY HEARING TRANSCRIPT(S) WAS/IS A DENIAL OF PETITIONER RIGHTS OF EQUAL PROTECTION AND DUE PROCESS OF LAW
- (b) THAT IDENTIFICATION OF PETITIONER AS THE INDIVIDUAL WHO HAD COMMITTED AFOREMENTIONED CRIMES WAS NOT ONLY SUGGESTIVE BUT THE RESULT OF SUBSTANTIAL VIOLATIONS OF PETITIONER'S CONSTITUTIONAL RIGHTS
- (c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) PETITIONER WAS DENIED AT THE TIME OF TRIAL THE TRANSCRIPT OF THE PRELIMINARY HEARING, PETITIONER WAS POOR AND UNABLE TO PAY FOR THE SAME, AND EVENTHO IT WAS PETITION FOR ON MORE THAN ONE OCCASION PRIOR TO AND DURING THE TRIAL IT WAS NOT PRODUCED UNTIL AFTER PETITIONER'S CONVICTION. HOWEVER, WHAT WAS PRODUCED THEN WAS ONLY A PARTIAL TRANSCRIPT, ONE OF THREE (THE LAST APPEARANCE PETITIONER HAD BEFORE THE LOWER COURT AND NOT THE INITIAL APPEARANCE WHERE PETITIONER WAS WITHOUT COUNSEL AND SUBSTANTIAL VIOLATIONS HAD

TAKEN PLACE. THAT THE COMPLETE TRANSCRIPT WAS DENIED THE TRIAL JUDGE, PETITIONER COUNSEL, AND THE APPEAL COURTS: THAT IT WAS NOT UNTIL PETITIONER COULD AFFORD TO PURCHASE THE LOWER COURT TRANSCRIPT DID HE RECEIVE THE COMPLETE TRANSCRIPT, AND THIS WAS AFTER THE TRIAL COURT JUDGE HAD VIEWED THE PARTIAL TRANSCRIPT, AND APPEAL HAD BEEN TAKEN AND DENIED.

- (b) THAT PETITIONER'S IDENTIFICATION BOTH PHOTOGRAPHIC AND IN COURT WAS NOT ONLY SUGGESTIVE BUT THE IN COURT IDENTIFICATION WAS THE RESULT OF PERJURED TESTIMONY BY THE ASST. STATE ATTORNEY WHO KNOWINGLY, FALSELY STATED THAT STOLEN PROPERTY HAD BEEN RECOVERED FROM PETITIONER HOME. THIS STATEMENT WAS MADE PRIOR TO PETITIONER BEING IDENTIFIED BY THE COMPLAINANT, AND AFTER HEARING SUCH TESTIMONY COMPLAINANT THEN WAS CALLED UPON TO IDENTIFY PETITIONER AS HER ASSAILANT.

(c)

12. Prior to this petition have you filed with respect to this conviction:

- (a) any petition in a state court under the Illinois Post-Conviction Hearing Act, Ill.Rev.Stat., ch. 38, sec. 122?

NO

- (b) any petitions in a state court by way of statutory *coram nobis*, Ill.Rev.Stat., ch. 110, sec. 72?

NO

- (c) any petitions in state or federal court for habeas corpus?

NO

- (d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)?

NO

- (e) any other petitions, motions or applications in this or any other court?

YES

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:

- i. A Motion in the Trial Court Challenging the Partial Preliminary Hearing Transcript as Being Falsified/Not Only Was it Incomplete But From the Information Supplied by Counsel it Was Deleted as Well with Crucial Testimony Being Taken Out of it.

ii. _____

iii. _____

iv. _____

- (b) the name and location of the court in which each was filed:

- i. Circuit Court of Cook County, 26005. California, Chicago, Illinois

ii. _____

iii. _____

iv. _____

- (c) the disposition thereof:

- i. "Taken Off Call" by the Trial Judge

ii. _____

iii. _____

iv. _____

- (d) the date of each such disposition:

- i. Oct. 1st. 1968

ii. _____

iii. _____

iv. _____

- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. None: the Motion I Filed Was a Continuation of the Trial Procedures

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? YES

15. If you answered "yes" to (14), identify:

- (a) which grounds have been previously presented:

- i. 10(a); That Denial of Preliminary Hearing Record Denied Const. Rights.

- ii. 10(b); That Identification was Suggestive

iii. _____

iv. _____

- (b) the proceedings in which each ground was raised:

- i. Direct Appeal to the Illinois Supreme Court

- ii. Petition for Writ of Certiorari to United States Supreme Court

iii. _____

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) In both 10(a) and (b) the grounds were raised but owing to the continual denial of prelimi-

nary hearing transcript even after appeal had been taken certain crucial and supporting factors were not available; factor which support petitioner's claim of denial of due process and were not available until after petitioner had purchase the complete preliminary hearing transcript and after and appeal had been taken and denied on the partial record.

(b)

(c)

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? NO

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction which you filed? YES

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Frederick F. Cohn 35 E. Wacker Drive Chicago Illinois 60601

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. At Trial

ii. On Direct Appeal to Illinois Supreme Court

iii. On Petition for Certiorari Before the US Supreme Court

19. If you are seeking leave to proceed in *forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, Page 1 of this form? YES

/s/ James R. Moore
Signature of Petitioner

STATE OF ILLINOIS)
) ss
COUNTY OF WILL)

James R. Moore, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ James R. Moore
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 28 day of August, 1973

/s/ Edwin J. Meyer
Notary Public

My commission expires
Nov. 14, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2222

UNITED STATES OF AMERICA EX REL
JAMES RAYMOND MOORE

v.

STATE OF ILLINOIS

MEMORANDUM OF DECISION

Petitioner is currently serving three sentences of thirty to fifty years and one sentence of five to ten years imposed by the Circuit Court of Cook County after a jury found him guilty of robbery, burglary, rape and deviate sexual assault. He has brought this petition for a writ of habeas corpus on the grounds that his constitutional rights were violated as the result of an improper identification and because he was only provided a partial transcript of his preliminary hearing.

This Court does not reach a decision on the merits of petitioner's contention. Federal habeas corpus is designed to provide a remedy for those who have been subjected to state prosecution and incarceration in violation of their federal rights. However, Section 2254 of Title 28 of the United States Code limits the issuance of the writ to those instances in which the petitioner has exhausted his state remedies or has clearly demonstrated the unavailability of state corrective processes. Any habeas corpus petitioner, therefore, must (1) have sought relief in each court of the state's hierarchy in which a remedy is currently available, and (2) show that precisely those points raised in federal court were previously raised in the state courts or may no longer there be raised. If either of these conditions remains unfulfilled, an application for a writ of habeas corpus must be denied.

In the case at bar, the petitioner has not filed any petition under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. Ch. 38, Sec. 122, which is currently available to him. In light of his failure to exhaust this available state remedy, the petitioner has not complied with the requirements set forth in 28 U.S.C. Sec. 2254.

Accordingly, his petition must be dismissed at this time for failure to exhaust state remedies. An appropriate Order will be entered.

/s/ William J. Lynch
Judge
United States District Court

DATED: March 20, 1974

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 25, 1974

Before HON. WILBUR F. PELL, JR., Circuit Judge
HON. JOHN PAUL STEVENS, Circuit Judge
HON. ROBERT A. SPRECHER, Circuit Judge

No. 75-1510

UNITED STATES OF AMERICA, EX REL.
JAMES RAYMOND MOORE, PETITIONER-APPELLANT,

vs.

STATE OF ILLINOIS, RESPONDENT-APPELLEE.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

No. 73 C 2222

WILLIAM J. LYNCH, *Judge*

ORDER

Petitioner was found guilty, after a trial in state court, of robbery, burglary, rape and deviate sexual assault. His conviction was affirmed by the Illinois Supreme Court, and certiorari was denied by the United States Supreme Court.¹ *People v. Moore*, 51 Ill.2d 79, 281 N.E.2d 294 (1972), *cert. denied*, 409 U.S. 979. He then petitioned pro se for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court dismissed the petition and thereafter denied a certificate of probable cause on the ground that petitioner failed to pursue

¹ Petitioner was represented at all stages of his state proceedings by appointed counsel.

the remedy afforded by the Illinois Post-Conviction Hearing Act. Ill. Rev. Stat. ch. 38, §§ 122-1 *et seq.*

Petitioner now asks, also pro se, that we grant a certificate of probable cause, 28 U.S.C. § 2253, and leave to appeal in forma pauperis. He contends that each of the issues presented to the district court was decided in *People v. Moore*;² thus, the exhaustion requirement of § 2254 has been satisfied.

The grounds upon which petitioner seeks relief are not entirely clear when one considers only the petition for a writ of habeas corpus. In several documents filed after the district court rendered its decision,³ however, petitioner plainly states that two grounds were presented. First is whether he "was denied equal protection when the trial court refused to furnish a transcript of the preliminary hearing at which the identification witness testified?" Second is whether his identification was "the product of a suggestive photographic identification procedure and a suggestive corporeal identification procedure?"

These two issues were expressly adjudicated by the Illinois Supreme Court in *Moore*.⁴ In *United States ex*

² In his "Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis," which was filed in the district court, petitioner states that

the same points raised in Federal District court were raised and adjudicated by trial court and State Supreme Court along with having been presented to the U.S. Supreme Court.

....

[A] verbatim rendering of the questions presented to the trial court, state Supreme Court, and U.S. Supreme Court may not have been given to the Federal District court but the nature and substance of the questions were the same and that any verbatim differences is ascribed to petitioners laymanness.

³ "Affidavit in Support of Application for Certificate of Probable Cause" (filed in this court); "Notice of Appeal: Motion to Proceed on Appeal in Forma Pauperis"; "Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis" (filed in the district court).

⁴ The court in *Moore* held that denial of the transcript deprived petitioner of equal protection, but that the error was harmless. 51

rel. *Adams v. Pate*, 418 F.2d 815, 817 (7th Cir. 1969), this court stated:

If the state's highest court has ruled on the federal question on direct review of the conviction, the petitioner [in a § 2254 proceeding] is not required to present the same claim in a post-conviction proceeding as well.

Accord, *Hunter v. Swenson*, 442 F.2d 625, 629 (8th Cir. 1971); *Williams v. Oriscello*, 441 F.2d 1113, 1114 (3d Cir. 1971); *Pleas v. Wainwright*, 441 F.2d 56, 57 (5th Cir. 1971); *Smith v. Peyton*, 408 F.2d 1009, 1010 (4th Cir. 1968). Consequently, petitioner has exhausted his state remedies with respect to both of the above issues.⁵

Both the transcript issue and the identification issue are alleged in the habeas corpus petition in terms which are broad enough to encompass facts which were not before the Illinois Supreme Court. Thus, the habeas petition indicates that petitioner did not receive three pre-

Ill.2d at 81-82, 281 N.E.2d at 296. With respect to the identification issue, it ruled:

The record does not support defendant's contention that the examination of the photographs was conducted in a manner to suggest the selection of any of the 200 individuals as her assailant and the fact that she was permitted to see the defendant at the preliminary hearing does not, under the circumstances shown, taint her identification. The record shows a sufficient basis for an identification wholly independent of the viewing of the photographs and her seeing the defendant in person at the preliminary hearing is shown to have merely confirmed her identification from the photograph.

51 Ill.2d at 86, 281 N.E.2d at 298.

⁵ Under the circumstances of this case it is clear that petitioner may not take advantage of the Illinois Act. See *People v. Dale*, 406 Ill. 238, 244-45, 92 N.E. 2d 761, 765 (1950). It might properly be held, therefore, that petitioner has exhausted his state remedies because the only relief arguably available is not in fact available. *United States ex rel. Gates v. Twomey*, 325 F.Supp. 920 (N.D. Ill. 1971); see *United States ex rel. Allum v. Twomey*, 484 F.2d 740, 742-43 (7th Cir. 1973). We need not, however, rest our decision on this ground. Compare *United States ex rel. Crump v. Sain*, 264 F.2d 424, 426 (7th Cir. 1959).

liminary hearing transcripts whereas the Illinois Supreme Court reviewed only one of them.⁶

Accordingly, we grant the certificate of probable cause and leave to appeal in forma pauperis, vacate the district court's decision and remand for all necessary proceedings consistent with this opinion. See *Townsend v. Sain*, 372 U.S. 293; *Shelby v. Phend*, 445 F.2d 1326, 1327-1328 (7th Cir. 1971).

⁶ Petitioner alleges that he did not receive any transcripts until after his trial. However,

what was produced then was only a partial transcript, one of three—the last appearance petitioner had before the lower court and not the initial appearance where petitioner was without counsel and substantial violations had taken place

He goes on to state that transcripts of these other hearings were not provided until after his state "appeal had been taken and denied."

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 73 C 2222

April 7, 1975

UNITED STATES EX REL. JAMES RAYMOND MOORE,
PETITIONER,

vs.

THE STATE OF ILLINOIS, RESPONDENT.

APPENDIX A TO PETITIONER'S REPLY MEMORANDUM

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

AFFIDAVIT

I, FREDERICK F. COHN, being first duly sworn
depose and say as follows:

1. That I am an attorney at law presently engaged
in the private practice of law in Chicago, Illinois.
2. That on or about April 5, 1968, I was appointed
by the Court as Counsel for James R. Moore in cause
number 68-549 then pending in the Circuit Court of Cook
County, Criminal Division entitled *People of the State
of Illinois v. James R. Moore*.
3. That prior to such appointment, Mr. Moore was
represented by other counsel and affiant did not repre-
sent James R. Moore at the preliminary hearing held in
such cause.
4. That cause number 68-349 was tried before the
Honorable Richard C. Fitzgerald in the Circuit Court of
Cook County, Criminal Division.

5. That I was advised prior to the trial of such case
by one of the two Assistant States Attorneys, Thomas
Tully or Matthew Walsh, who were then assigned to
prosecute criminal cases in Judge Fitzgerald's courtroom
and who did prosecute Mr. Moore in the case, that the
complaining witness, Marilyn Miller had examined the
guitar and flute taken by the police from the home of
James R. Moore on the night of his arrest. He was fur-
ther advised that Marilyn Miller upon such examination,
had stated that such items were not those taken from
her apartment by her assailant the night of her alleged
assault and were not hers.

6. That I have examined a copy of the Transcript of
Proceedings occurring in James R. Moore's case on De-
cember 21, 1967 before the Honorable Daniel J. Ryan, a
xerox copy of which is attached hereto.

7. That I had no knowledge of the fact that in such
proceedings the assistant States Attorney stated in open
court in the presence of the complaining witness that
"When the defendant was arrested upon an arrest war-
rant signed by the Judge of the Court, the articles, the
guitar and other instruments were found in the apart-
ment, as were the clothes described of the man that at-
tacked her that day" nor did, I have any knowledge that
such statements were immediately followed by the prose-
cutor's elicitation from her of an identification of James
R. Moore as her assailant.

8. That I have no doubt or reservations about stating,
upon my examination of the attached transcript that
my lack of knowledge of the colloquy reported therein
because of my requests for a transcript were refused,
seriously and substantially prejudiced the opportunity to
demonstrate more suggestion and influence upon Marilyn
Miller's identification of James B. Moore than was dem-
onstrated during the course of the proceedings in the
hearing on the Motion to Suppress such identification
and the subsequent trial.

9. That had I been aware of such circumstances, I without question, could and would have demonstrated more suggestion than was demonstrated by me as Mr. Moore's attorney acting without knowledge of what had occurred at such proceedings.

/s/ Frederick F. Cohn
FREDERICK F. COHN

SUBSCRIBED AND SWORN to before me this 7th day of April 1975.

/s/ Deborah Keller
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2222

UNITED STATES OF AMERICA
EX REL JAMES RAYMOND MOORE, PETITIONER

v.

STATE OF ILLINOIS, RESPONDENT

MEMORANDUM OF DECISION AND ORDER

Petitioner previously filed with this Court a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C., Section 2254. This Court originally dismissed the petition on the ground that petitioner had failed to pursue the remedy afforded by the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., Ch. 38, Sec. 122-1 *et seq.*

Petitioner appealed the Court's dismissal of his petition to the Circuit Court of Appeals. The Court of Appeals reversed the finding of this Court dismissing the petition. In so finding, the Court of Appeals determined that petitioner's previous presentation to the Supreme Court of Illinois of the issues advanced in his habeas petition satisfied the exhaustion requirement of Section 2254. The Court of Appeals consequently remanded petitioner's case to this Court and indicated that this Court should determine the need for an evidentiary hearing or any other relief warranted by the facts following this Court's review of the entire state record.

Petitioner is represented by counsel following the remandment of his case. Counsel has filed an original memorandum of law and then an amended memorandum of law in support of the constitutional issues raised in petitioner's writ of habeas corpus. The amended memorandum advanced two grounds for release of petitioner due to violations of his constitutional rights: (1) Pe-

itioner was denied Fourteenth Amendment due process and the effective assistance of counsel when he was denied copies of transcripts of pre-trial hearings which contained the identification testimony of the State's sole occurrence witness and; (2) Certain pre-trial identification procedures were highly suggestive and violative of both due process and the Sixth Amendment.

Respondent has filed a motion to dismiss the petition for failure to state a claim upon which relief can be granted and an alternative motion for summary judgment, pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

The Court finds that upon a reading of the entire state court record, as well as a review of the various memoranda and affidavits filed by both parties, that there remain no outstanding issues of material fact and, consequently, this case is ripe for treatment through the medium of the motion for summary judgment.

The complaining witness testified at petitioner's trial on charges of rape, deviate sexual assault, burglary, and robbery, that on December 14, 1967, at approximately noon, she was awakened from a nap by a noise in her apartment. As she opened her eyes, she saw a man standing in her room. When the complainant screamed, the man physically assaulted her. She was then forced to perform an act of oral copulation and to submit to sexual intercourse. While leaving the apartment, the assailant took several items of personal property including two musical instruments. The complainant identified petitioner as the man who attacked her.

A jury found petitioner guilty of each of the above charged offenses and he was sentenced to concurrent terms of not less than thirty (30) nor more than fifty (50) years on each of the rape, burglary, and robbery convictions, and not less than five (5) nor more than ten (10) years on the conviction for deviate sexual assault.

Further facts, as they relate to the issues raised in the petition, will be dealt with in the Court's treatment of those issues.

I

Denial of Copies of the Preliminary Hearing Transcripts

In remanding this case to this Court, the Circuit Court of Appeals indicated the necessity of reviewing three preliminary hearing transcripts. This Court, in reviewing the entire state court record and the submissions by both parties has found transcripts of only two pre-trial hearings, other than the hearing on the motion to suppress identification, those hearings held on December 21, 1967, and February 5, 1968. Petitioner's amended memorandum of law does not refer to any other pre-trial hearings. Therefore, this Court deems a review of the two referred to transcripts as sufficient in light of this particular issue.

In petitioner's direct appeal to the Illinois Supreme Court, that Court ruled that petitioner's right to equal protection of the laws was violated by the trial court's failure to grant petitioner a copy of the transcript, citing *Roberts v. LaValle*, 389 U.S. 40 (1967). The Illinois Supreme Court, however, went on to rule that the denial of the transcript was harmless beyond a reasonable doubt citing *Chapman v. California*, 386 U.S. 18 (1966). This conclusion was reached following a review of the testimony at the trial, the testimony of the preliminary hearing held on February 5, 1968, and at the hearing on the motion to suppress the identification of the petitioner by the complaining witness.

This Court has reviewed the entire state court record including the testimony given at all of the above hearings and the pre-trial hearing held on December 21, 1967. A review of the testimony at each of the above proceedings indicates that the denial of the transcripts of the pre-trial hearings, although amounting to a denial of equal protection of the laws, was harmless beyond a reasonable doubt.

Petitioner's additional assertion that he was denied his Sixth Amendment right to the effective assistance of counsel is based on the premise that his counsel would have been better prepared to cross examine and, pos-

sibly, impeach the complaining witness at trial. However, a review of these pre-trial proceedings does not indicate any inconsistency between the complainant's testimony at those proceedings and her later testimony at trial. Consequently, the position taken by petitioner that he was denied the effective assistance of counsel due to his failure to obtain a copy of the pre-trial proceedings has no solid foundation.

The petitioner alludes to one statement made by the complainant during her testimony at the preliminary hearing on February 5, 1968, which petitioner argues could have opened a possible avenue of impeachment. The statement by the complainant was to the effect that the lighting conditions in her apartment at the time of the incident resembled, "... night, as clear as it could be ..." A reading of the transcript of the entire hearing, however, indicates that the statement was either a slip of the tongue or a reference to a darkening of her room because the windows were covered. A reading of the transcript of the December 21, 1967, proceeding fails to indicate any discrepancy between her testimony of that day and any testimony she gave at subsequent proceedings.

Petitioner has attached to his reply memorandum an affidavit given by the attorney who represented him at both the pre-trial hearing on the motion to suppress identification and at trial. The affidavit states that if defense counsel had had a copy of the transcript of the hearing of December 21, 1967, he could have employed it at the subsequent motion to suppress identification to further indicate the amount of suggestion and influence present in the complainant's identification of petitioner at the December 21 hearing.

The Court notes at this point that the circumstances surrounding the identification made at the hearing on December 21 were developed substantially at the hearing on the motion to suppress even though defense counsel did not have the benefit of the requested transcript. As to the suggestive nature of certain remarks made by the Assistant Cook County State's Attorney at the hearing on December 21, the Court will more fully treat the

impact of those statements in the second section of this opinion. However, it is this Court's opinion that any constitutional deprivation resulting from the denial of the transcripts of the hearings on December 21, 1967 and February 5, 1968, was harmless beyond a reasonable doubt.

II

The Pre-Trial Identification Procedure

Petitioner asserts in his second major contention that the pre-trial identification procedure was highly suggestive and resulted in violations of his due process and Sixth Amendment rights.

The identification procedure which is said to have been unduly suggestive took place on December 21, 1967; one week after the incident which led to petitioner's prosecution.

On December 21, 1967, the complainant was brought to Court for what was to be a preliminary hearing. A policeman had told the complainant that there was a suspect and that she should identify him if she could. The complainant was sitting in the courtroom when her name was called. The petitioner's name was called after hers. The complainant approached the bench and the petitioner was brought out into the courtroom. The only other people in the immediate area were the petitioner's wife and two bailiffs. One of the bailiffs was black, as is the petitioner, but was shorter and heavier than petitioner. The following colloquy took place:

The Clerk: James Raymond Moore.

The Court: Are you James Raymond Moore?

Mr. Moore: Yes, sir.

The Court: You're charged with rape and deviate sexual assault. Are you ready for hearing? Is Marilyn Miller here?

Miss Miller: (The complainant) Here.

Mr. Walsh: (Assistant State's Attorney) Judge, we're going to request a continuance, at this time. There's further investigation being conducted for prints being found on the scene. This is an allega-

tion of rape and deviate sexual assault. It's a home invasion of an apartment in Hyde Park and the victim was raped and forced to commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. Do you see the man in Court today that committed these acts upon your person?

Miss Miller: Yes.

Mr. Walsh: Will you point to him?

Miss Miller: There. (Indicating)

Mr. Walsh: Indicating the defendant, James Raymond Moore, for the record. We'll request a short continuance, two weeks to prepare our evidence.

No attorney had been appointed for petitioner at the time of the above hearing.

The complainant, Miss Marilyn Miller, had signed a complaint against petitioner prior to the above proceeding. Petitioner argues that the complainant first learned that petitioner was the man she was to identify when she linked the name on the complaint she had previously signed with the name (i.e., petitioner's name) that was called in the courtroom. The transcript of proceedings is less than clear as to what effect the calling of petitioner's name in the courtroom had on the complainant's identification of petitioner. The confusion may have arisen from the fact that the complainant had never known the name of the man who had raped her. Nonetheless, Miss Miller asserted in a very positive manner, regardless of the possible suggestive influence in the way she first linked petitioner's name to his person, that she did know that the person who was brought out into the courtroom was the man who had raped her.

Several elements surrounding the identification procedure used at the hearing on December 21, indicate that the procedure was suggestive. The record indicates

that petitioner was viewed by the complainant in what was essentially a single-man show up. The only other men present at the time of the identification were two bailiffs. One of the bailiffs was a black man but he was shorter and heavier than the petitioner. Furthermore, the Assistant State's Attorney made several remarks in the presence of the complainant which could easily have been construed by the complainant as strong indications that significant incriminating evidence had been seized from the petitioner's apartment. All this had come prior to the time complainant had an opportunity to indicate her belief that petitioner was the man who had raped her. The above elements indicate that the procedure employed was suggestive and is not approved by this Court.

The Supreme Court established the rule in *Stovall v. Denno*, 388 U.S. 293 (1972), that whether a confrontation conducted in a particular case is "so unnecessarily suggestive and conducive to irreparable mistaken identification that [a defendant] was denied due process of law . . . depends on the totality of the circumstances surrounding it." 388 U.S. at 302.

In the case of *Neil v. Biggers*, 409 U.S. 188 (1972) the Supreme Court held that the central question concerning the identification procedure employed is whether under the "totality of circumstances" test the identification was reliable even though the confrontation procedure was suggestive. The Court held that the significant factors to be considered in deciding the reliability issue were: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. See *United States ex rel Kirby v. Sturges*, 510 F. 2d 397 (7th Cir. 1975).

A consideration of the above factors in the instant case indicate to this Court that the complainant's identification of petitioner was sufficiently reliable to blunt the due process argument of petitioner.

Contrary to the argument of the petitioner, a reading of the transcript of the testimony given by the complainant at trial indicates that she had a good opportunity to observe the perpetrator of the crimes at the time of the incident.

Although the complainant had been asleep in the bedroom of her apartment, she was awakened by a noise. She then had an opportunity to observe the intruder at close range for ten or fifteen seconds. The time of the incident was approximately noon and, although there were coverings over the two windows in her room, a significant amount of sunlight filtered into the room from both windows and from the open doorways to adjoining rooms. The complainant indicated that she was very alert at the time. Complainant's positive identification of the petitioner as the intruder was bolstered by the fact that a man she identified as the petitioner had approached her in a bar the night before the incident and had spoken with her at close range for several minutes after approaching her.

The complainant had given a description of her attacker prior to the suggestive confrontation which described the man as six feet to six feet-two inches, over 200 pounds, dark-complected, and having facial hair around his lips and chin. The petitioner's description in the record was six feet-two inches, 240 pounds, and having a beard.

The complainant exhibited a high level of certainty during every corporeal identification of defendant. The only time she hesitated was during a photographic lineup when she picked out two or three photos out of approximately 200 photos shown to her but even then she did pick out petitioner's photo.

Seven days passed between the date of the crime and the date of the suggestive confrontation, but this was not an unduly long delay considering the circumstances surrounding her observations on the day of the crime. The above facts indicate that the complainant's identification of petitioner at his trial was quite reliable.

Petitioner asserts that this Court should apply to his case the exclusionary rule promulgated by the Supreme Court in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) that identification testimony should be excluded at trial if a post-arrest identification proceeding takes place in the absence of counsel. Petitioner argues that the exclusionary rule is applicable even though the identification procedure in question took place prior to petitioner's indictment (see *Kirby v. Illinois*, 406 U.S. 682 [1972]) but after a complaint had been signed against him. The Court finds it unnecessary to decide this question.

The exclusionary rule of *Wade-Gilbert* is not a *per se* rule. The admissibility of the identification testimony depends upon whether the witness' identification of the petitioner is based on a source independent of the witness' observation of him at the identification procedure. *United States v. Pigg*, 471 F. 2d 843 (7th Cir. 1973).

According to the above observations, it is clear that the complaining witness' identification of petitioner at trial had an origin independent of the suggestive proceeding on December 21. Therefore, whether the *Wade-Gilbert* principle is applicable or not would have no impact upon this Court's ruling.

The Court would note that this finding of a strong independent origin for the complainant's identification of petitioner contributes strongly to the finding of harmless error reached in the first section of this opinion.

Finally, the Court notes that petitioner has asserted that the statements made by the Assistant State's Attorney at the proceeding on December 21, 1967, which were quoted above, relating to certain evidence seized in petitioner's apartment were untrue and were known to be untrue by the prosecutor at the time he made them. This assertion appears to be a bare allegation without any support or elaboration in the memoranda or exhibits submitted to this Court. The affidavits which were submitted by petitioner's counsel do not, contrary to counsel's contention; establish the truth of this assertion. Furthermore, this observation is made only within the overall context of the major argument relating to the

suggestive nature of the pretrial identification. Because of the Court's findings relating to the reliability of the complainant's identification testimony at trial, notwithstanding the suggestive nature of the pre-trial identification, the Court feels that the question of the verity of the statements made by the prosecutor is not so crucial as to alter the Court's finding.

Accordingly, in light of the above observations, the respondent's motion for summary judgment is granted.

/s/ William J. Lynch
Judge
United States District Court

Dated: June 3, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable WILLIAM J. LYNCH

Cause No. 73 C 2222

Date July 3, 1975

Title of Cause

UNITED STATES EX REL JAMES RAYMOND MOORE v.
PEOPLE OF THE STATE OF ILLINOIS

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

The petitioner's motions for leave to appeal *in forma pauperis*, pursuant to Rule 24 of the Federal Rules of Appellate Procedure, and for the issuance of a certificate of probable cause, pursuant to 18 U.S.C., Section 2253, are hereby granted.

Having reviewed the petitioner's motions, attached affidavits, and the respondent's submission in opposition to the issuance of a certificate of probable cause, the Court finds that defendant is without sufficient funds to prosecute the appeal in this cause, that the appeal is not frivolous, and that the issues presented by said appeal represent cognizable claims for relief under 28 U.S.C., Section 2254.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 27, 19—

(Argued January 20, 1976)

Before HON. JOHN S. HASTINGS, Senior Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

No. 75-1697

UNITED STATES OF AMERICA, EX REL.
JAMES RAYMOND MOORE, PETITIONER-APPELLANT,

vs.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 73 C 2222
WILLIAM J. LYNCH, Judge

ORDER

Petitioner was indicted and convicted on charges of burglary, deviate sexual assault, rape and armed robbery in 1968. He brought this petition for a writ of habeas corpus on due process and equal protection grounds alleging that his conviction was based upon an impermissibly suggestive identification; that he was denied effective assistance of counsel; that he was entitled to a pre-trial hearing transcript; that the government withheld evidence favorable to the defense; and, that the prosecutor knowingly made false statements in court. The district court, in an extensive and thorough opinion, dismissed the habeas corpus petition. We affirm.

The facts in the case show that Marilyn Miller was raped in the bedroom of her apartment around 12:00 noon on December 14, 1967. She had entered her bedroom for a nap at 11:15 or 11:30 a.m. and was asleep when she was suddenly awakened by a noise. Upon looking across the room to the bedroom doorway she observed a man armed with a knife-like object. She later described him as over six feet tall, very powerful, dark complected, young Negro male, over 200 pounds in weight. As she tried to get out of bed, her feet got tangled in a quilt. The man then threw himself on the bed on top her and twisted her body so that her face was forced into the pillow and she was lying on her stomach. About 10-15 seconds elapsed between the time she first saw the man in the doorway until her face was pushed into the pillow. While she was face down, the man removed parts of her clothing, turned her over and placed a quilt over her face. As she turned over, she observed his face was now covered with a bandana below the eyes. He then forced her to perform a deviate sexual act and raped her. The man next left the bedroom, went into an adjoining room out of her view for a short time and left the apartment. Miller called the police and then noticed that her guitar and flute were missing. Left behind was a plastic folder resembling a checkbook or an address book which allegedly belonged to the defendant's former girlfriend.

On the evening preceding the rape, Miller had been accosted by the man who raped her in a nearby restaurant. He took her by the hand and, on the pretense of reading her palm, made suggestive remarks about a supposed lack in her love life and his ability in that regard.

Two days after the rape the police showed her several hundred photographs from which she selected two or three pictures. One was a photograph of petitioner James Raymond Moore.

Moore was arrested on December 20, 1967 and brought to court on the next day for a preliminary hearing. At the hearing Miller positively identified Moore as the man who had raped her. Following a probable cause hearing, indictment and trial, Moore was convicted and

sentenced to serve 30 to 50 years. Moore's conviction was affirmed by the Illinois Supreme Court, *State of Illinois v. Moore*, 51 Ill.2d 79 (1972) and he subsequently filed this petition for habeas corpus relief.

I. DEFENDANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS OF DUE PROCESS WHEN IDENTIFIED.

The Supreme Court has recognized that flagrantly suggestive pretrial identification procedures may result in a denial of a defendant's right to due process of law. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 968 (1968); *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972). In *Stovall v. Denno* the Court stated the test for a violation of a defendant's due process right; i.e., whether the identification of a particular defendant is "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied a due process of law . . . depends on the totality of the circumstances surrounding it . . ." 388 U.S. 302. In applying this test the Court further instructed in *Neil v. Biggers* that the trial judge must decide "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive."

The trial judge, in the instant case, filed an extensive and well written opinion outlining the facts surrounding the identification and applying the factors annunciated in *Neil v. Biggers* to determine whether the identification was reliable. He concluded that, although the confrontation procedures used to obtain petitioner's identification were suggestive, the identification was quite reliable and indeed was based upon an independent origin; i.e., on a source [the photo spread] other than the physical confrontation. We have carefully reviewed the facts and are in agreement with the trial court's conclusion.

After the defendant was arrested the victim, Miller, was requested to attend the first preliminary hearing.

She had already selected the defendant's photograph from the police files. She was sitting in the courtroom when the defendant's case was called. She recognized the name of the case because she had previously signed a complaint against Moore. As Moore was brought into the courtroom Miller was motioned up to the bench by the Assistant State's Attorney. The judge asked Miller if she recognized petitioner Moore and she nodded affirmatively. At the time of the physical confrontation Moore was the only defendant present. Admittedly this was not a valid line-up but rather a suggestive one-on-one show-up. Yet, Miller had previously selected Moore's picture from a spread of over 200 photos. This situation parallels a previous decision of this Court in *United States v. Pigg*, 471 F.2d 843 (7th Cir. 1973) wherein an identification was also made in a suggestive setting at a pretrial hearing. The Court approved of the identification despite its suggestiveness because the witness had previously identified the defendant's photograph. The Court concluded:

"Therefore, there is sufficient evidence that her identification of Pigg came from a source independent of the arguably suggestive observation of the defendant at the Dayton, Ohio hearing", 471 F.2d at 848.

Similarly, in this case Miller had made an independent identification of Moore before the identification in court. But even overlooking this independent identification there is substantial other evidence that the identification was reliable. Miller clearly saw the defendant the night before the crime when he made suggestive remarks to her in a restaurant. When he entered the apartment she was able to observe him for 10 or 15 seconds in daylight before he overcame her. She never took her eyes off him during this time. During the actual rape his features were only partially hidden by a bandana. Her testimony at trial was quite forthright:

Q. "When you saw James Moore come out of that side door in Judge Ryan's . . . [courtroom] did you recognize him at that time?"

A. "Yes."

Q. "Did you recognize him at that time as the man who raped you on the 14th of December, 1967?"

A. "Yes. I'd never forget his face."

Q. "Are you sure that's the man?"

A. "I'm positive."

Miller persisted in her identification despite pleas by the petitioner's wife that she might have picked the wrong man. Although Miller did not have a long time to view the petitioner it is highly unlikely that she would be mistaken. Considering that the nature of the crime involved a personally humiliating, terrifying and painful occurrence, it is reasonable to assume she could remember what her assailant looked like.

Recently in *Israel v. Odom*, 521 F.2d 1370 (7th Cir.) this Court was presented with another rape case wherein the witness identification was also made in a highly suggestive situation. The Court reviewed the facts of the rape strikingly similar to the instant case, and concluded that the identification was reliable. Chief Judge Fairchild concluded for the Court:

"The identification procedures employed in this case were suggestive in varying degrees, and unnecessarily so. They are not condoned. The constitutional consideration here, however, is not police behavior but rather reliability of identification. While this case is close, we have carefully studied the testimony and concluded that there was no deprivation of due process", 521 F.2d at 1376.

We believe that we are in the same position as the Court in *Israel v. Odom*, *supra*. In light of the reliable testimony of the victim there was no danger of "irreparable misidentification". Thus we do not think the defendant's due process rights were violated.

II. PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS DENIED A COPY OF THE PRETRIAL TRANSCRIPTS.

The trial court concurred with the Illinois Supreme Court and properly held that the trial judge's denial of appointed counsel's request for a transcript of the pretrial hearing amounted to a denial of equal protection. However, the trial judge added that the denial was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1966).

On appeal petitioner states that since counsel was not appointed until after the pretrial hearing he had no knowledge of the initial proceedings. He argues further that if defense counsel had a transcript he would have been alerted to the serious problem of the suggestive identification at the hearing, he could have more effectively cross-examined Miller who made the identification, he could have moved for a new trial on the basis that the government withheld evidence, or he could have obtained a mistrial because the government made false statements to the court.

A transcript from the pretrial hearing shows that the following colloquy occurred:

THE CLERK: "James Raymond Moore." •

THE COURT: "Are you James Raymond Moore?"

MR. MOORE: "Yes, sir."

THE COURT: "You're charged with rape and deviate sexual assault. Are you ready for the hearing? Is Marilyn Miller here?"

MISS MILLER: "Here."

MR. WALSH: "Judge, we're going to request a continuance, at this time. There's further investigation being conducted of prints being found on the scene.

This is an allegation of rape and deviate sexual assault. It's a home invasion of an apartment in Hyde Park and the victim was raped and forced to

commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar, and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. Do you see the man in Court today that committed these acts upon your person?"

MISS MILLER: "Yes."

MR. WALSH: "Will you point to him?"

MISS MILLER: "There (Indicating)."

MR. WALSH: "Indicating the defendant, James Raymond Moore, for the record. We'll request a short continuance for two weeks to prepare our evidence."

THE COURT: "January 19th."

In fact some of the assistant state's attorney's comments were in error. None of the articles recovered in the defendant's home actually were the articles taken from the Miller apartment after the rape. However, there is no evidence in the record that the prosecutor knowingly made false statements or that evidence favorable to the defense was withheld in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). When the prosecutor made his remarks he was simply relying on the best information available to him at that time, which later turned out to be incorrect. Certainly the court did not rely on those statements in scheduling the next court date and setting bond. The transcript does not really contain exculpatory material. Under *Brady* the nondisclosure of evidence violates due process only when it is "material either to guilt or punishment." We do not believe that there was anything material in the transcript denial which related to petitioner's ultimate guilt or punishment.

Petitioner's other allegations arising out of the denial of the transcript also do not rise to a constitutional dimension which would require reversal. Petitioner says his counsel was denied the right to effectively cross-examine the victim because he did not have the tran-

script which showed the suggestive nature of the identification. Yet a reading of the record indicates that petitioner's able trial counsel extensively cross-examined Miller on her identification as well as the facts of the crime. It is difficult to see how the pretrial transcript really could have aided him in cross-examination.

III. PETITIONER'S RIGHT TO COUNSEL WAS NOT VIOLATED AT THE INITIAL PRETRIAL IDENTIFICATION.

Petitioner contends that this Court should follow the exclusionary rule outlined by the Supreme Court in *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967) and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951 (1967); that identification testimony should be excluded at trial if a post-arrest identification proceeding takes place in the absence of defense counsel. However, since the petitioner's identification at the pretrial hearing, the Supreme Court has adopted *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877 (1972) which narrowly limits the per se exclusionary rule to line-ups "after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Although the petitioner's identification occurred prior to the *Kirby* decision we think it is applicable since it was an attempt by the Court to explain and perhaps narrow the *Wade-Gilbert* decisions.

Under the facts of this case we do not think there is any Supreme Court authority which requires reversal. First of all, the *Wade-Gilbert* principle is inapplicable because prior to the in-court identification, Miller had identified the defendant as her assailant from police picture files. Her in-court identification was of an independent origin. Second, the in-court identification could hardly be considered a line-up.

Third, assuming that *Wade-Gilbert* applied, *Kirby* states that the per se exclusionary rule will only be used in post-indictment situations. This was the petitioner's first appearance in court and there is no doubt that it

was prior to his indictment. Even if counsel had been present at the initial court hearing it is difficult to imagine what he could have done to protect petitioner's interest. The court hearing was scheduled, the complaining witness had already selected the defendant, and at some point in the prosecution a confrontation would occur. However, we do not condone this practice by the prosecution and only suggest that a formal line-up before or immediately after arrest would have been the better practice to follow. Since the district court was correct in finding an independent origin for the identification it was also correct in refusing to apply a *Wade-Gilbert* exclusionary rule.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 75-1697

June 10, 1976

Before

Hon. JOHN S. HASTINGS, Sr. Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

UNITED STATES EX REL. JAMES RAYMOND MOORE,
PETITIONER-APPELLANT

vs.

PEOPLE OF THE STATE OF ILLINOIS,
RESPONDENT-APPELLEE

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Divsn.

(73 C 2222)

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing.

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

STATE OF ILLINOIS)
) ss:
 COUNTY OF COOK)

THE MUNICIPAL COURT OF CHICAGO
 First Municipal District of
 THE CIRCUIT COURT, COOK COUNTY, ILLINOIS

No. 76 MC CC

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—vs—

JAMES RAYMOND MOORE, DEFENDANT

[1] REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable DANIEL J. RYAN, Judge of said Court, this 21st day of December, A.D., 1967.

APPEARANCES:

HON. JOHN J. STAMOS,
 State's Attorney, by
 MR. MATTHEW WALSH,
 Assistant State's Attorney,
 appeared for the Plaintiff,
 MR. JAMES RAYMOND MOORE,
 appeared pro se.

[2] THE CLERK: James Raymond Moore.

THE COURT: Are you James Raymond Moore?

MR. MOORE: Yes, sir.

THE COURT: You're charged with rape and deviate sexual assault. Are you ready for hearing? Is Marilyn Miller here?

MISS MILLER: Here.

MR. WALSH: Judge, we're going to request a continuance, at this time. There's further investigation being conducted of prints being found on the scene. This is an allegation of rape and deviate sexual assault. It's

a home invasion of an apartment in Hyde Park and the victim was raped and forced to commit an oral copulation. Taken from her was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. Do you see the man in Court today that committed these acts upon your person?

MISS MILLER: Yes.

MR. WALSH: Will you point to him?

MISS MILLER: There. (Indicating)

[3] MR. WALSH: Indicating the defendant, James Raymond Moore, for the record. We'll request a short continuance, two weeks to prepare our evidence.

THE COURT: January 19th.

MR. WALSH: The State will ask for a \$5,000 bond.

THE COURT: I'll make it \$10,000 all together.

MR. WALSH: All right, Judge, thank you very much.

STATE OF ILLINOIS)
) ss
 COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
 FIRST DISTRICT—MUNICIPAL DIVISION

No. 68 549

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—vs—

JAMES R. MOORE, DEFENDANT

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—

FEBRUARY 5, 1968

* * *

[2] MARILYN MILLER,

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. NEVILLE:

Q State your name, please.

A Marilyn Miller.

Q And you reside at 1512 East 53rd Street in the City of Chicago, is that correct?

A Yes, sir.

[3] Q On December 14, 1967, at about 12:15 P.M., what, if anything, occurred at your apartment?

A The defendant entered the apartment and approached me. I was sleeping on the bed. I must have awakened when I heard the door open.

Q How was entry to your apartment gained?

A The door was not locked. It was closed but not locked.

Q Do you see the man in court who came into your apartment?

A Yes.

Q Point him out, please.

A (Indicating).

Q Indicating for the record, the defendant, James Moore.

* * *

[6] Q Had you ever seen the defendant prior to the time he entered your apartment?

A Yes, the night before.

Q Where had you seen him the night before?

A In Smedley's Bar and Grill, in the same block where I live.

Q Had there been any conversation between you and the defendant at that time?

[7] A Yes.

* * *

CROSS EXAMINATION BY MR. HOUSE:

Q What is your occupation?

A Research specialist.

Q Where?

[8] A Encyclopedia Britannica.

Q What was the lighting conditions in your apartment at the time this took place?

You say you were home in bed?

A Right.

Q What were the lighting conditions?

A It was night, as clear as it could be, but—

Q The shades and blinds were drawn?

A There is a blanket over the window. There are no curtains.

Q So there was hardly any light?

A There are no doors between the living room and the bedroom.

There are open spaces, so there was light coming in.

* * *

[10] EXAMINATION BY THE COURT:

Q Did he take anything when he left the apartment?

A Yes.

Q What did he take?

A A Bundy flute and a Martin guitar.

Q Was there a medical? Did you go to the hospital after that?

A Yes.

THE COURT: Was the medical positive?

THE POLICE OFFICER: It was positive.

MR. HOUSE: I believe the flute and guitar was never recovered.

Is that right?

THE POLICE OFFICER: No.

THE COURT: But it was taken.

What is the corroboration?

MR. NEVILLE: There was a letter found.

THE COURT: What is the letter—

MR. NEVILLE: A letter was written by another witness who we have in court today.

* * *

[11] THE COURT: Did you see his record?

MR. HOUSE: I saw all of that.

THE COURT: Here is five years, eight years in '55, two to ten in 1960.

This will be held to the grand jury on all three.

The bond is \$10,000.00 on each one.

MR. HOUSE: I would still like to ask some questions of the complaining witness and the other witnesses that the State has, if it please Your Honor.

THE COURT: What good will it do?

I am going to hold it over anyway.

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—
April 5, 1968

* * *

(The following colloquy occurred outside the presence of the Defendant and prior to selection of the Jury)

* * *

[9] THE COURT: * * * We'll ask that the Grand Jury minutes be preserved, we'll ask the preliminary hearing statements be preserved, any police reports that might be made relating to this case may be preserved and made available at the time of trial.

MR. COHN: Is it my understanding that you deny my request to have supplied to me prior to trial a copy of the preliminary hearing?

[10] THE COURT: You are not entitled to it. I'll have it made available for you and for your use at the time of trial.

MR. COHN: May I argue that motion, your Honor?

THE COURT: What is the basis that you have?

MR. COHN: Well, there is a case out of the United States Supreme Court, the citation I do not have—

THE COURT: Don't get Federal discovery rules versus the discovery rules of the State of Illinois.

MR. COHN: No. It is LaValley v. Roberts, I do not have the citation, it is a case arising out of the State of New York, and the Supreme Court said an indigent de-

fendant has a right to receive a transcript of a preliminary hearing. Since a nonindigent defendant can purchase this, any road block put before an indigent, like my client, which caused him to have less rights than a person with money, was a violation of the constitutional rights of equal protection.

Now, if my client had funds I could go to the court reporter and order a transcript written or a certain date and I could get it. I can do that before trial. It is not like the Grand Jury and police reports, I can get that before trial, hence, [11] if I can do it for a client that can afford it I have a right to it for an indigent defendant prior to trial, as per Griffin, and I would like that document written up.

MR. WALSH: People v. Gibbons, 228 NE 2nd, the Court says the defendant is not entitled to a free transcript of the preliminary hearing.

THE COURT: That is the rule that has been followed by our Appellate Court and I'm going to follow it, I see no reason to change it, that has been the established custom here and I know in Griffin and other decisions the defendant is entitled to certain transcripts and they are supposed to be available for him at the time of trial, and it has been the custom of this Court to allow counsel to view these transcripts prior to the placing of the respective witness on the stand in an effort to familiarize the defendant with the previous testimony, and any and all reports, but I see no reason why we should deviate and grant this defendant any other additional pretrial discovery that we don't afford any other defendant.

* * *

[12] MR. COHN: The next point, your Honor, is a point your Honor has not ruled on, a motion I made with regards to the identification procedure conducted after this defendant was arrested and indicted on one of these charges which occurred in Judge Holzer's courtroom. I believe I have a right to a list of witnesses who were present during that procedure.

THE COURT: I would presume and I would rule on your motion once a motion has been filed wherein which

the identity is to be contested, and in the event you are endeavoring to contest the identification of this witness and move to suppress the identification of this witness then at that time I think it would be appropriate for you to move for the production of those witnesses and we will issue the necessary subpoenas.

MR. COHN: Your Honor, but my point is, prior to moving to suppress those witnesses I have a right, in order to prepare for my motion to suppress, I have a right to go out and talk to those witnesses, the witnesses who were the people in the lineup. * * *

* * *

[13] * * * I think the pretrial discovery rules in this court do not permit us to insist that the State furnish you with those witnesses. If, however, there is a failure to cooperate and if there is evidence and if there are witnesses that are being in any manner secluded this Court will issue the necessary subpoenas.

* * *

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—
June 24, 1968

* * *

The Witness, FLORENCE SUZANNE MOORE, having been duly sworn, was examined and testified as follows:

[80] DIRECT EXAMINATION BY MR. COHN:

* * *

Q Were you present when your husband was arrested?

A Yes.

Q On what day was he arrested?

A December 20th.

Q Where was he arrested?

A At home.

Q Were you in court the next day?

A Yes.

Q In which court were you?

A I beg your pardon?

Q Where in court? What courtroom?

A Judge Ryan's courtroom, I believe.

Q Did you see the complaining witness there?

A Yes.

Q Would you please describe what occurred in Judge Ryan's courtroom on that date relative to your husband's case.

A Well, the case was called, James Moore, and we walked up to the bench.

Q Excuse me. Where did he come from?

A Oh, from the back. He was in custody.

Q Who else walked up to the bench?

A A girl.

Q Was that the complainant?

A Yes.

[81] Q Who else was standing at the bench besides the complainant and your husband?

A Well, there were two people from the State, the bailiffs, me—

Q Where was your husband standing?

A In the same place you are standing.

Q Where I am standing now?

A Yes.

Q Where was the complaining witness standing?

A Over on the—

Q You can look until I am, you know, to where she was.

A At the end of the table, facing this way.

Q Would you state that your husband and the complaining witness were approximately three or four—

A The length of the table.

Q The length of the table, which would be approximately seven feet.

MR. TULLY: Seven, eight feet.

MR. COHN: Q Was she asked any questions?

THE WITNESS: A The judge addressed her. I can't remember the statement verbatim, but it was something to the effect of did she recognize—

Q And what did she do?

[82] A She looked at my husband and nodded yes.

Q Were there any other people standing before the bar of the same height as your husband?

A No.

Q Was anyone else standing before the bar who was Negro?

A Bailiff.

Q Bailiff. How old was the bailiff?

A Oh, late thirties, early forties, I don't know. He was shorter and heavier.

* * *

The witness, MARILYN MILLER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. COHN:

* * *

[94] MR. COHN: Q Did you identify my client as the [95] person who was in your apartment?

THE WITNESS: A Yes.

Q Where?

A In front of Judge Ryan's court.

Q Did you see him at a prior—at a prior time in a line-up?

A No.

Q Who brought you to court on the day in question?

A Officer Buehler.

Q Did you have conversations with Officer Buehler?

A We talked, I'm sure. Not about the trial. Not about the case.

MR. COHN: I didn't—will you—Mr. Court Reporter, do you wish to read that back.

(The last answer was read by the reporter.)

MR. COHN: Q Did he tell you the purpose or the reason you were going to be in court?

THE WITNESS: A Yes.

Q What did he tell you?

A He told me that there was a suspect, and if I could identify him, I should.

Q Did he tell you under what conditions you would see the suspect?

A I don't remember.

* * *

[96] A I was sitting in the courtroom, and Mr. Moore's name was called and I was called, and I looked at him and I told the judge that this was the man.

Q Now, you were sitting there in the courtroom when his case was called.

A Yes.

* * *

[97] THE WITNESS: A No, I came up and faced him.

Q How did you know to come up to the bar?

A My name was called.

Q Your name was called. Who called your name?

A I don't remember.

Q So it's when you came up and your name was called—at the time your name was called, did you realize that the person James Moore being brought out was the suspect you were supposed to identify?

A I knew it was the man. I recognized him.

MR. COHN: Your Honor, that's not responsive to my question. My question is: Did you know that the person being brought out when your name was called was the person you were to view and identify? Yes or no?

* * *

[98] Q Did you know that when your name was called, the suspect you were to view was to be brought out?

THE WITNESS: A Yes.

Q So when Mr. Moore approached the bench, did you know that he was the suspect you were to view?

A No. Not until his name was given.

Q And once his name was given, did you know that was the suspect you were to view?

A Yes.

* * *

[99] MR. COHN: Q Did you know or did you believe that the person James Moore, who was brought out, was the person you were to view?

* * *

[100] MR. COHN: Q Your name was called, is that correct?

THE WITNESS: A Yes.

Q And Mr. Moore's name was called, is that correct?

A Yes.

Q And when his name was called, he was standing at the right hand corner of the table here, is that correct?

A Yes.

Q And you were standing at the left hand corner.

A Yes.

Q At that instant, did you believe that the person standing at the right hand corner was the person you were supposed to view?

A Yes.

* * *

[101] MR. COHN: Q At the time Mr. Moore was standing here, was there any person standing to the left or the right of Mr. Moore who was as tall as Mr. Moore, the same color as Mr. Moore, the same—

THE WITNESS: A I don't remember.

Q You don't—

A His wife was there, but I don't remember anyone else.

Q Now, when this rape occurred, had you been asleep?

A Yes.

Q And something woke you?

A Yes.

Q Was there a light on in your room?

A No.

Q Are you presently wearing glasses?

[102] A Yes.

Q Were you wearing glasses on that occasion?

A No.

* * *

[102] Q What does that window look out on?

A It looks out on Harper Court at a shop there. I think it's a yarn shop. And a porch.

Q Was there anything covering the window?

A Yes.

Q What was the covering?

A There's a torn, yellow quilt.

Q By quilt, do you mean what is commonly known as a blanket which is quilted?

[103] A Yes.

Q And this covered the entire window?

A Yes.

Q Now, was the assailant masked?

A Not when he entered.

Q So when you first saw him when you were waking up, he was not masked.

A Right.

Q And then he covered his face with something?

A Later.

Q What did he cover his face with?

A A red and white bandana.

Q How much of his face did this cover?

A It covered—it left the eyes and the top of the head.

Q Just the eyes and the top of the head showed?

* * *

[104] Q So then how long from the moment you first saw him until the time you were lying on your stomach with your face down, how long was that?

A Ten to fifteen seconds.

Q And after that ten or fifteen second period, the only time you saw him again was with a bandana on his face.

A That's right.

Q And that fifteen or ten seconds was immediately after you had just woken up from a sleep, is that correct?

A Yes.

* * *

[105] Q Did you talk with Officer Pace?

A Yes.

Q Did you describe your assailant?

A I don't remember.

Q Did you talk to any other officers?

A The detectives arrived shortly after.

Q What were the names of the detectives?

A Detective Pachol and Wasilewski.

Q Did you talk to them?

A Yes, I did.

Q Did you describe your assailant to them?

A Yes, I remember that.

Q Do you remember the description you gave?

A Yes.

Q Will you please relate the description you gave.

A He was over six feet, he was heavy set, very solid. He had some hair on his face. I told what he was wearing, physical description, that's it.

Q What else did you tell the officers about the assailant?

* * *

[106] Do you recall whether he asked you your name?

A I think he did.

Q Now, were any items taken?

A Yes.

Q What was taken?

A A Martin guitar with one string missing, broken, and a Bundy flute in a black case.

Q Was any money taken?

* * *

[107] MR. COHN: Q Did you ever tell any of the officers that you had seen the assailant at some prior time?

THE WITNESS: A Yes.

Q Who did you say that to?

A To the detectives.

Q To which detective?

A To both of them.

Q To both detectives. Where did you tell these detectives that you had seen the assailant?

A I had seen him in Smedleys Bar and Grill the night before.

Q Now, when you talked to these detectives, were they writing anything down?

A Yes.

Q Have you testified at the Grand Jury?

A Yes.

* * *

[108] MR. COHN: Your Honor, I believe that I have a right to—she has now said certain things. I have a right to see her reports. I believe there may be certain inconsistencies in those reports.

MR. TULLY: If he wants to use them for impeachment, he may do that during the course of the trial.

MR. COHN: I have a right to impeach her at this hearing.

MR. WALSH: She is counsel's witness. There is no showing of hostility. As a matter of fact, she has done everything to cooperate.

THE COURT: Overruled.

* * *

[109] MR. COHN: Q Now, prior to seeing my client, Mr. Moore, in Judge Ryan's court, did you view any photographs?

THE WITNESS: A Yes, I did.

Q And from these photographs, did you select any photographs that resembled the assailant?

[110] A Yes.

MR. COHN: Your Honor, at this time I request the State to produce all photographs which this person had viewed. I filed a subpoena on the State for this.

THE COURT: Do you have them?

MR. WALSH: Judge, I would indicate for the record that we have some photographs. Now, whether or not these are in fact the exact ones, I am not in a position to say. The detective who showed her would possibly be more apt to be able to give you an exact answer. I don't know whether Miss Miller would recognize all these particular photos or not. I have some photos, and for what they are worth, they are available for examination by the Court or counsel.

MR. COHN: Well, your Honor, then at this point I am requesting that the witness be—

THE COURT: Why don't you ask her how many she viewed.

MR. COHN: Q How many pictures did you view?

THE WITNESS: A I had two viewings. On the Saturday after the crime I viewed several hundred. And they were—they went back ten, twenty years, even. And I picked out the persons that fitted the physical, the height and weight.

And then on Monday or Tuesday there was a [111] newer batch of twelve or so, and I did the same. I picked out a couple that had the same build.

Q Well, after you had picked out five or six in one group and three or four from another group, did you finally pick out one photograph?

A No, I refused to.

Q You refused to?

A Yes.

MR. COHN: May I now see all the photographs which she did pick out.

MR. WALSH: Judge, again, I would—

THE COURT: Whatever photographs the State's Attorney has—

MR. WALSH: I have some photographs that were brought down by one of the detectives, and he says he thinks these are some of the photographs. He said they didn't make any notations on the back.

* * *

[112] MR. COHN: No, your Honor, I think the appropriate procedure, your Honor, at this point, would be to possibly have the witness removed from the stand to be able to put the officer on who brought the photographs down, call him relative to that and find out, you know, where he got these photographs from, because he was subpoenaed, and then he can explain whether these are or are not, then use these photographs for questioning this witness.

THE COURT: I would suggest that you look at the photographs that the State has in its possession and inquire and interrogate as to these photographs. And then as to how they arrived at these photographs, that may be determined by the officer who brought them down.

* * *

[114] MR. COHN: Well, your Honor, at this point, we only have two exhibits which she thinks she picked out.

THE WITNESS: I saw hundreds of photographs.

MR. COHN: Q You finally did pick out five or six photographs in toto?

THE WITNESS: A I think around thirty in one group, and a couple out of the twelve. I don't remember

how many. They all had the same height, sort of, and build.

MR. COHN: Your Honor, I believe unless the State can bring in a witness to explain why these are not here—I have a right to the pictures that this [115] lady picked out.

THE COURT: If they have them.

MR. COHN: If they do not have them, I believe I have a right for an explanation as to why they do not have them.

THE COURT: Proceed with your interrogation of this witness. We will meet that proposition when we come to it. And I will permit you to put this witness back on the stand, if need be, in order to clarify the point.

MR. COHN: Q Now, you state that you had seen the assailant at a prior time at Smedleys Restaurant, is that correct?

THE WITNESS: A That's true.

Q Would you tell me what day that was.

A December 13.

Q Would that be the day immediately prior to this incident?

A The evening before.

Q The evening before. At what time?

A 10:00 o'clock.

* * *

[116] Q Were you upstairs or downstairs?

A I went through the whole place. They have a back room there, too, I think.

MR. TULLY: Judge, I am going to object. He is attempting to suppress an identification. Now, surely any incident that occurred prior to the time of the identification itself is a question for the jury or the trier of facts to determine the credibility of a witness testifying. Surely it cannot be brought out at this time, Judge.

THE COURT: Well, I think that in the event that it is shown that this witness had an opportunity prior to the time in question, namely the court date, to have viewed this witness, then it would have a tendency

to show that the in court identification was not restricted and confined to such an extent at that time as to have any element of suggestibility. Therefore, if it is shown that this witness has had [117] an opportunity to see the defendant in the restaurant, it would be a—

MR. COHN: Your Honor, I admit this is evidence which is essentially beneficial to the State's position, and I felt since I have called the witness, I feel it is my duty to bring out all the evidence relative to the point.

THE COURT: Very well. Proceed.

MR. COHN: Q I believe your last statement was that you went through the entire restaurant, is that correct?

THE WITNESS: A That's true.

Q And did you end up sitting down any place?

A Yes.

Q And where did you sit down?

A On a wall seat or bench, it is. It would be facing, on the second floor there, on the—on this wall facing south. And there's a table there, and it's sort of—I remember a cash register being beneath it, so it's directly above where the cash register is below.

Q Now, did you have anything to drink that evening?

A Someone poured me a glass of beer, and I probably tasted it. I don't—I wasn't staying there. I was waiting for two people.

[118] Q Now, do you know who poured you a glass of beer?

A He said his name was Charles.

Q Did you have anything else to drink?

A In there?

Q In there.

A No.

Q Did you have anything else to drink prior that evening?

A I had a beer, maybe, or two.

Q Where did you have that beer?

A In the apartment above mine.

Q How long were you in Smedleys?

A Ten or fifteen minutes.

Q Did you have a conversation with the defendant?

A I did.

Q For how long did you converse?

A Two, three minutes.

Q Did you tell him your name?

A I don't think I did, no.

Q Did you tell anyone your name that evening?

MR. WALSH: Objection.

THE COURT: She may answer.

THE WITNESS: A I don't think I did. I wouldn't.

MR. COHN: Q Did you tell anyone where you lived?

A No.

[119] Q Now, what did you say to Mr. Moore or what did he say to you? What was the conversation about?

A Someone there was talking about palmistry, reading the lines of the hand. And he looked at my hand. I think right before then I was asked if I was doing anything that night or where I was going, if I could stay there.

Q Did Mr. Moore ask you whether you could stay there?

A No, someone else in his group. And I did have plans for that night and I didn't want anyone else to know. I mean I don't like people to come up to my party.

Q You were having a party at your house?

A I had four friends over.

And someone asked if I would—you know, if I could stay there, and I said no, that I was going somewhere and my boy friend was waiting for me.

And then Mr. Moore looked at my hand, grabbed my hand and said something about my heart line; that I needed some loving or something. And I don't remember how he said it, but he sort of offended me.

* * * *

The witness, Detective JOSEPH WASILEWSKI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. COHN

* * *

[155] MR. COHN: Q Officer, do you know for sure whether the three exhibits you picked out were pictures picked out by the complainant?

THE WITNESS: A No, sir, she didn't pick them out.

Q She did not pick them out?

A She picked one of those, sir.

Q She picked one of those out?

A That's correct.

Q And which one did she pick out?

A The photograph of the defendant.

[156] Q And what did she say about the photograph of the defendant?

A She stated that it looked like the man. She would like to see him in person.

Q And that is the photograph she picked out, is that correct?

A That's correct, sir.

* * *

[156] Q So those are the—those are three pictures you were sure she viewed, is that correct?

A Yes, sir.

[157] Q And out of those three pictures, only one of them possessed a beard, is that correct?

A That's correct, sir.

Q And did she describe her assailant as having a beard?

A Yes. She said he had hair around his mouth and chin.

* * *

[160] Q Did you put in your police report that Marilyn Miller said she had seen the assailant on the prior night?

A I don't recall.

* * *

[162] THE COURT: All right. Don't read that. It's not necessary to read that. The question was is there anything in your report that would indicate that the victim in this case stated that she saw the defendant at Smedley's the night before.

THE WITNESS: No, sir.

* * *

IN THE CIRCUIT OF COOK COUNTY,
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—
June 26, 1968

* * *

The Witness, MARILYN MILLER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALSH

* * *

[211] A Some noise woke me.

Q And were you in the bed at this time?

A Yes.

Q And then what if anything happened after you awoke?

A I looked up. I was still lying on the bed, and across the room in the doorway to the bedroom I saw a man standing there with a knife in his hand.

Q Would you demonstrate to the ladies and gentlemen of the jury at this time exactly how the individual was standing holding the knife in his hand.

A He was standing with the knife in his left hand (indicating), and he had something in his right that he was fumbling with. And I didn't—I am not able to identify what that was.

* * *

[212] Were you able to tell that the object in his left hand was in fact a knife?

A No, I think it was an awl or an ice pick. A long pointed thing, not a blade, but something you punch with.

* * *

A I started to move to get out of the bed. I [213] lifted myself up and I started to scream.

Q Now, can you describe the individual that you saw standing in your doorway on that particular day, Miss Miller?

A Yes.

Q Would you do that, please, for the ladies and gentlemen.

A He had on a yellow sweater and dark pants, and he was heavy built. Standing in the doorway, he just filled it up. He was over six feet tall.

Q Did you notice if the gentleman—Was it a man or a woman that was standing in the door?

A It was a man.

Q Did you notice if the individual was Negro or Caucasian?

A He was Negro.

Q Do you see that gentleman in the courtroom today, Miss Miller?

A Yes.

Q Would you step down from the witness stand and indicate by touching the man on the shoulder that you saw in your room on that day.

A He didn't have glasses on then.

MR. WALSH: Indicating, for the record, the defendant [214] before this Court, James Moore. Thank you.

* * *

Q Now, at the time you first saw him, what if anything did you do?

A I screamed.

Q And then what happened after that, if anything?

A My feet got tangled in my quilt, and so I couldn't get out of bed as quickly, and he was coming towards me and telling me not to scream, don't scream and don't

move, or something. And I was frozen, sort of staring at him and the knife in his hand.

* * *

Q Miss Miller, how long a period of time elapsed [215] from the time you first saw the defendant, James Moore, in the doorway until the time your face was pushed into the pillow?

A Ten to fifteen seconds. It seemed a lot longer, but—

Q All right. At the time—

MR. COHN: I object to "it seemed a lot longer."

THE COURT: Sustained.

MR. COHN: She said ten or fifteen seconds.

THE COURT: The latter portion may be stricken.

* * *

[216] A He was on top of me, so I couldn't see him, and he let go of my neck, and I knew he still had the knife or awl. And I don't know what he was doing, but I thought he was going to stab me, so I started screaming again.

* * *

Q Did he make any statement to you at that time?

A Yes. This was a much longer time. He was choking me, and I felt myself blacking out. And he said, "Don't scream. I'm not going to let go of your throat until you say you won't scream any more."

And I tried to tell him I wouldn't, and I couldn't say anything.

* * *

[217] I asked him if he was going to kill me, and he said he didn't want to have to.

And then he put his hands under me, I'm still lying on my stomach, and tried to undo the belt. And so I asked him if that was all he wanted, if he wanted to make love, or was he going to kill me. And he said—I don't remember what he said. He made some sort of noise or something.

* * *

[218] Q At the time your pants, your jeans and underpants, were removed, were you still face down on the bed?

A Yes, I was.

Q What if anything happened after that, after part of your clothing was removed?

A I was turned over and a quilt was put over my face.

* * *

[220] Q Well, at that time, Marilyn, what if anything did he do as he pulled himself up on your chest?

A He exposed himself, and then he arranged the quilt so that it was at the top of my head and my eyes were covered.

Q And then what did he do if anything at that time?

A Then he forced his penis in my mouth.

* * *

[221] Q And then what if anything occurred after that, Marilyn?

A He stayed there a minute, and then moved down off of my chest and separated my legs and had intercourse.

* * *

[223] Q What did you do, Marilyn, immediately after he left the apartment?

A I got up and found my pants on my left side of the bed on the floor, and I put them on.

* * *

[223] Q Did you notice anything else unusual when you bent over to pick up your pants?

A I saw what I thought was my checkbook on the floor, which I kept my money in.

Q Will you describe that article that you thought was your checkbook to the ladies and gentlemen.

A A long, narrow, sort of black plastic covered book.

* * *

[224] Q Did you have an occasion, Marilyn, to observe that any articles of personal property were missing from your apartment?

A Yes. Right before I called the police I saw that my flute and guitar had been stolen. And so I called the police then.

Q Prior to the time any police officers arrived, did you have an occasion to go back in and examine the bedroom at any time?

A Yes.

Q Did you have an occasion to see that blue book?

A I picked it up. And I had about \$60.00 in my checkbook, and I wondered if he had taken it. And then I realized that my checkbook was somewhere else and that this was a stranger's.

* * *

[225] Q Did you have an occasion, Marilyn, on that day, to see a member of the Chicago Police Department?

[226] A Yes.

Q Do you recall what the first officer's name was that you saw?

A Officer Pace.

Q Were you still in the apartment when you saw Officer Pace?

A Yes.

Q And what if anything did you do or say immediately upon Officer Pace coming to your apartment?

A I gave him that book and told him where I had found it.

Q Did you tell the officer what had happened to you?

A Yes.

Q Did you have a conversation with Officer Pace at that time?

A He asked me questions, and I don't remember much of what he asked or what I told him.

Q Did you have an occasion, Marilyn, later on that same day, to go to a hospital in the City of Chicago?

A Yes.

Q Do you recall the name of that hospital?

A Billings Hospital.

* * *

[232] Q And did you recognize any of the individuals in those photographs?

A I picked one out.

Q Was that a photograph of the defendant, James Moore?

A I think it was, yes.

* * *

[234] Q Did you know at the time, Marilyn, that he stepped out of that door, that he was James Moore?

A I knew he was the man who raped me.

Q Did you know he was—Did you know his name was James Moore at that time?

A I don't remember if they called it before he came out or after.

Q And did you subsequently approach the Judge's bench?

A Yes.

Q Did you have an occasion to see the defendant, James Moore, after you approached the Judge's bench?

A Yes.

Q Did you have an occasion to look at him at that time?

A I did.

Q Was he looking at you at that time?

A Yes.

Q Did you identify him as the same man who came into your apartment on the 14th of December and raped you?

A Yes.

* * *

During the CROSS-EXAMINATION of the Witness, MARILYN MILLER, the following colloquy took place:

* * *

[254] But at this stage, I think the defendant should be entitled to review a copy of the police report.

MR. COHN: Thank you, Your Honor.

Your Honor, I have also requested that I be given the preliminary hearing testimony.

THE COURT: They gave you the Grand Jury hearing?

MR. COHN: Right. In fact, when I made—

THE COURT: You have that, have you not?

MR. COHN: The preliminary hearing, Your Honor. In fact, I had made a motion prior to trial—

THE COURT: You are not entitled to the reports of the preliminary hearing.

MR. COHN: I had made a motion prior to trial.

* * *

[255] At that point the State said I had no right to it before trial but I had a right to it at trial for the purpose of impeaching.

THE COURT: You mean this witness? I think you are entitled to it.

MR. TULLY: We don't have it.

MR. WALSH: It wasn't ever written up or never ordered by the Court to be written up.

MR. COHN: Your Honor, I would state on this record that the State's Attorney in open Court stated they would have it available and ready for trial after the witness had testified.

MR. WALSH: We indicated, Judge, the Grand Jury minutes would be preserved for trial, the police reports would be preserved for trial, which they are. There was never any request or demand made upon the State to produce a preliminary hearing transcript. I don't even know if this witness testified at the preliminary hearing.

* * *

[256] THE COURT: Did she testify at a preliminary hearing?

MR. WALSH: Not to the best of my knowledge.

THE COURT: The only preliminary hearing was before Judge Ryan, is that correct?

MR. WALSH: That's correct, Judge.

THE COURT: Well, why don't we ask her whether or not she testified.

MR. COHN: She just said she—

THE COURT: She said she was present.

MR. COHN: Well, we know she identified him in Court once and some questions were asked on one date.

THE COURT: Why don't we ask her and find out.

* * *

[257] THE COURT: When you went before Judge Ryan you remember appearing before Judge Ryan?

THE WITNESS: Yes.

THE COURT: Did you offer any testimony down. Were any questions asked of you?

THE WITNESS: Yes.

* * *

[258] MR. WALSH: I know of no Statutory provision or case law that permits the defendant at this time, or at any time, to have a copy of a preliminary hearing transcript.

THE COURT: It is true that he is not entitled to it on pre-trial discovery. He is not entitled to it prior to the time of trial.

But I am in wonderment as to whether or not at this stage of the trial, if a statement was made in a preliminary hearing, whether or not he would be entitled to it. He is certainly not entitled to it on pre-trial discovery.

MR. WALSH: Judge, I don't think we are bound to supply this.

* * *

[259] THE COURT: All right. We will proceed.

MR. COHN: Is Your Honor denying my motion?

THE COURT: I am not denying your motion. I say [260] that the transcript of the preliminary hearing is not here. The State does not have a copy of the preliminary hearing report in its file. The proceedings in the preliminary hearing have not, to the best of my knowl-

edge, or to the best of the knowledge of the State, been written up, nor is it available at the time of trial here. The Court, therefore, feels that we can't give the defendant what is not available.

You have the testimony of this witness before the Grand Jury. I am ordering that you be permitted to have the Grand Jury testimony. And I am also ordering that any statement made by this witness to a police officer should also be afforded to you at this time so that you may proceed to cross examine and impeach the witness in any manner you can.

MR. COHN: May I have the police report? I still have not received the same, Your Honor.

Your Honor, then, therefore, at least is denying my motion, because my understanding—

THE COURT: I am not denying your motion. The transcript is not here. The transcript is not available. If it isn't available, I can't deny your motion to the right to it.

. . . .

CONTINUATION OF CROSS EXAMINATION
BY MR. COHN:

. . . .

[263] MR. COHN: Q Now, Miss Miller, at the time you saw your assailant in the room at approximately 12:00—It was approximately 12:00 o'clock, is that correct?

THE WITNESS: A To 12:15, yes.

Q 12:00 to 12:15. And you had been sleeping for approximately a half hour, is that correct?

A Yes.

Q And you are presently wearing glasses, is that correct?

A Yes.

Q Were you wearing glasses then?

A No.

Q Was there a light on in the room?

A No.

Q Is there a window in the room?

A Yes.

Q Was anything covering the window?

A Yes.

Q What was covering the window?

[264] A A quilt and a bedspread.

Q And that covered the entire window?

A Yes.

Q Prior to the assailant getting on top of you, you saw him for about ten to fifteen seconds?

A Yes.

Q And after that time, your face was down in a pillow, is that correct?

A Yes.

Q And during the time your face was down in the pillow, on occasion you became dizzy, is that correct?

A Yes.

Q And then while you were dizzy you occasionally caught a glimpse of the assailant masked with a bandana, is that correct?

A No.

Q Was he wearing a bandana the next time you saw him?

A Yes.

Q Was he wearing a bandana after that at all times?

A Yes.

.

[265] Q So you saw the assailant for a total of ten to fifteen seconds having just woken up, and then on five second intervals when he was masked, is that correct?

A That's true.

Q Now, the first officer you spoke to, was that Officer Pace?

A Yes, it was.

Q Did you tell Officer Pace that the assailant was a male Negro, twenty to twenty-five, 185 pounds, six feet, dark complexion, wearing a yellow sweater?

A I don't think I would have said 185 pounds.

.

[266] Q Did you tell Officer Pace that you had seen the assailant at some prior time?

THE WITNESS: A Not at that point, no.

Q When was the first time you told Officer Pace that you had seen the assailant at some prior time?

A I told the detectives when we got back from the hospital.

Q I see. So you never told Officer Pace that?

A I don't think I did.

Q How long was it from the time the police arrived until the time you got back from the hospital?

A I don't know.

.

[279] Q Now, on a later occasion, the 21st, you were in Judge Ryan's Court, is that correct?

A I think it was the 20th.

Q The 20th or the 21st.

A Yes.

Q Who brought you down to Court?

A Detective Buehler.

Q Did he tell you, or did you know you were there to view a person?

A Yes.

Q Was a name called?

A Yes.

Q Was your name called immediately after that name [280] was called?

A I don't really remember if my name was called or if I was motioned to come up.

.

Q And you were called, is that correct?

A Called or motioned to come up.

Q Who called and motioned you to come up?

A I think it was Mr. Neville.

Q Who is Mr. Neville?

A He works here. I don't know who he is.

Q Is he a State's Attorney?

A I think so, yes.

Q And you came up, is that correct, to the bench?

A Yes.

.

[281] Q And where was Mr. Moore standing?

THE WITNESS: A He was almost right next to me.

Q Almost right next to you. Was there any other Negroes standing at the bar, the bench of the bar?

A Yes, there was.

Q Would you please describe them for me.

A It was a woman.

Q Any other Negro men standing there?

A I don't remember if there was or not.

Q At that time, did you realize that Mr. Moore had been arrested and charged as being the assailant in the incident which occurred in your apartment?

A No.

Q You did not realize that?

[282] A No.

MR. WALSH: Objection. She answered the question.

MR. COHN: Q Did you think he was just a stranger?

THE WITNESS: A I knew I was supposed to look at this man and tell them if he was the one or not.

Q Right. And was he brought out from the back?

A Yes, he was.

Q Was he handcuffed?

A I don't remember.

Q Did he come out by himself or did he come out with a Court official next to him?

A With a Court official.

Q How long had you sat in the courtroom before Mr. Moore had come out?

A Quite awhile.

Q Had you seen other cases called?

A Yes.

[283] Q Were people's names called?

A Yes.

Q And normally a person came out of the back room and stood here where Mr. Moore had been standing, is that correct?

A Yes.

[285] MR. COHN: Q Yes or no. Did you believe he was a stranger to the proceedings? Yes or no.

THE WITNESS: A No.

Q Did you believe he was involved with that proceeding where they called the name of James Moore? Did you believe he was involved? He was a—Strike that. Did you believe he was a police officer?

A No.

Q Did you believe he was a State's Attorney?

A No.

Q Did you believe he was a defendant?

A I knew he was the man who raped me.

Q Answer yes or no.

MR. TULLY: Let the witness answer. I haven't heard that answer.

Mr. Court Reporter, would you read that answer back, please.

[287] A I had signed a complaint, so I recognized the name.

Q You had signed a complaint charging who with rape?

A James Moore.

Q This was before you had come into Court and identified him, is that correct?

A Right before.

Q Before you had ever seen him in Court, is that correct?

A Yes, and I said—I questioned that, and I was told it made no difference.

Q Ah! Who told you it made no difference?

A Officer Buehler.

Q Officer Buehler told you it made no difference, you can—

A That I would just come up here, and if it is the man, yes, and if it isn't, no.

You had been told to sign a complaint against Mr. James R. Moore, is that correct?

A Yes.

[288] Q Who told you to sign a complaint against James R. Moore?

A Officer Buehler.

Q And Officer Buehler was one of the investigating officers on this case, is that correct?

A He came in later.

Q Yes. And when you came to Court and you were called up to the bench of the bar, James R. Moore's name was called out, is that correct?

A Would you repeat that.

Q James Moore's name was called out, is that correct?

A Yes.

[297] MR. COHN: Q Now, to which officer did you state that the assailant was the same man you had seen the prior evening?

MR. WALSH: Objection, Judge. This question has been asked and answered.

THE COURT: She may answer.

THE WITNESS: A Detective Pachol and Wasilewski.

MR. COHN: Q And they were writing things down when you told them, is that correct?

A They stopped writing at that point.

* * *

REDIRECT EXAMINATION BY MR. WALSH

* * *

[304] Q Was there any light coming in that window even with the bedspread on it?

A Yes, there's light coming in. And I put a—it was a torn quilt over the top so that no one would be able to look through the thinner material.

Q And you said there is another window in the bedroom also, is that correct?

A Yes.

Q Was there anything covering that window?

A There were—It's a material you can see right through. It's a gauze, a green colored gauze. * * *

* * *

Q Even with this green gauze material on it, there was still light coming through the window?

A The gauze wouldn't keep any light out.

* * *

[308] Q When you saw James Moore come out of that side door in Judge Ryan's chambers, did you recognize him at that time?

A Yes.

Q Did you recognize him at that time as the man who raped you on the 14th of December, 1967?

A Yes. I'd never forget his face.

Q Are you sure that's the man?

MR. TULLY: What? I can't hear.

MR. WALSH: I beg your pardon.

Will you read the answer.

(The last answer was read by the reporter.)

MR. WALSH: Q Are you sure that is the man?

THE WITNESS: A I am positive.

MR. WALSH: Thank you. That's all.

RECROSS EXAMINATION BY MR. COHN

Q You are also positive that you never picked out only one photograph, is that correct?

A Yes.

* * *

The Witness, Officer FLOYD PACE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALSH

* * *

[325] Q Did she tell you how much she thought he weighed?

A She had no idea.

Q Did you make an estimate from the description that she gave you as to how much the man weighed?

A From her description, I made it the minimum.

Q And what is the minimum?

A 185.

* * *

[329] CROSS EXAMINATION BY MR. COHN

Q Officer, you were the first officer on the scene, is that correct?

A Yes.

Q You filled out a report in this case, Officer?

A Correct.

* * *

[331] Q Did she tell you that she had seen the assailant before on a prior occasion?

A Not to my knowledge, on the initial investigation.

Q And you were with her for how long before the detectives arrived?

A I'd say about eight to ten minutes. Transporting her to the hospital.

* * *

IN THE CIRCUIT COURT OF COOK COUNTY,
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS—
JUNE 27, 1968

* * *

The Witness, DETECTIVE LAWRENCE PACHOL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALSH

* * *

[391] Q Under what circumstances did you see Miss Miller the following Saturday?

A We had arranged an appointment with Miss Miller to come in and view photos that we had at the Area.

Q How many photographs were shown at that time?

A I'd say approximately 200.

Q Did she indicate or pick out any of the photographs that were shown to her at that time?

A She put several on the side that matched the physical description of the offender.

Q Subsequent to the 14th of December, 1967, did you have an occasion to inventory the letter that you have identified and the blue wallet?

A Would you repeat that, please.

Q Subsequent to the day of the 14th of December, 1967, did you have an occasion to inventory People's exhibits number 1, the blue wallet, and number 4, the letter?

A Prior to that date?

Q Subsequent. After the 14th.

A Oh, after that date. Yes, sir.

Q And was that inventoried with the Chicago Police Department?

[392] A Yes, sir, they were.

Q Did you have an occasion to make the physical arrest of the defendant, James Moore?

A Yes, sir.

Q On what day was the defendant arrested?

A 20th of December, 1967.

* * *

CROSS EXAMINATION BY MR. COHN

* * *

[394] Q Does it state in that report, the only report made, that Marilyn Miller stated to you or to any of your fellow officers, that the assailant had been in Smedley's Restaurant the night before?

A No, sir, it doesn't.

Q Who made that report with you, Officer?

A Detectives Buehler and Wasilewski.

Q And those were the officers who had talked to Marilyn Miller, is that correct?

A Yes, sir.

* * *

The Witness, DETECTIVE JOSEPH WASILEWSKI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WALSH

* * *

[421] A It was either Monday or Tuesday, the following Monday or Tuesday.

Q And where was it that you saw her at that time?

A That was at the Harper Library on the campus of the University of Chicago.

Q And did you have certain photographs with you at that time?

A Yes, sir, I did.

Q Approximately how many in number did you have?

A Nine.

Q And were these photographs shown to Marilyn Miller on that day?

A Yes, sir, they were.

Q Did she indicate or pick out any of the particular photographs that you showed to her?

A She selected the photograph of the defendant as being the man who had attacked her. She also selected one more with the same physical characteristics of the man.

* * * *

IN THE CIRCUIT COURT OF COOK COUNTY,
CRIMINAL DIVISION

INDICTMENT No. 68-549

Before Judge Richard J. Fitzgerald

June 28, 1968

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES R. MOORE

INSTRUCTIONS SUBMITTED BY STATE AND DEFENSE RE:

IDENTIFICATION

[625] (State's Instruction No. 4 Given.)

The court instructs the jury that in determining whether or not the defendant has been identified as the person who committed the offense charged in the indictment, if any such offense was committed, you must consider all the testimony in the case, both that for the prosecution and that for the defendant; considering the means of identification; the circumstances under which he was identified; the opportunity for identifying the said defendant; the description of his apparel as stated by the witnesses; and the probabilities or improbabilities that it was the defendant—and, if after so judging and weighing the testimony, you are satisfied beyond all reasonable doubt that the defendant has been correctly identified as the person who committed the offense as charged in the indictment, it is your duty to find the defendant guilty.

[639] (Defense Instruction No. 13 Refused.)

The court instructs the jury that in determining whether or not the defendant has been identified as the person who committed the offense charged against him, you must consider all the testimony in the case, both that for the prosecution and that for the defendant, consider-

ing the means of identification; the circumstances under which he was identified; the opportunity for identifying the said defendant; the influence brought to bear on persons claiming to identify defendant, if any such influence existed; the description of the assailant as stated by the witnesses, if any such was stated; if after so judging and weighing the testimony you are not satisfied beyond all reasonable doubt that the defendant has been correctly identified as the person who committed the offense as charged in this indictment, if any was committed, it will be your duty to find the defendant not guilty.

SUPREME COURT OF THE UNITED STATES

No. 76-5344

JAMES RAYMOND MOORE, PETITIONER

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 17, 1977

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

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SUPREME COURT, U.S.

UNITED STATES ex rel.
JAMES R. MOORE,

Petitioner,

vs.

ORIGINAL COPY

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

Repeal Bill
OPPOSITION TO
PETITION FOR ISSUANCE OF
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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